

Virginia Water Resources Workshop



**Do You Have The Water Rights You Think
You Have, And How Is Your Water Supply
Plan Affected By Those Rights?**

Presented by
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“When the well is dry, we
[will] learn the worth of
water [and good water
supply planning].”

Ben Franklin, Poor Richards Almanac, 1746





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Overview

- Common law water rights
 - Riparianism
 - Prior Appropriation
 - Groundwater
- Permitted rights
 - VWP/401 Permitting
 - Sec. 62.1-104
Impoundments
 - SWMA
 - GWMA
 - Water Supply Planning
 - “Grandfathering”



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Why Care?

- What Are the Risks To Your Existing Water Supply
- Who Might Oppose Your New Projects and On What Grounds
- What Rights Can You Assert When Talking with the Regulators or with Competing Water Withdrawals
- As Between Competing Uses, Will Your Record Show That You Considered These Issues

A close-up photograph of concentric ripples on a dark, calm water surface, creating a circular pattern that fades out towards the left.

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Who Owns the Water?



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Scenarios

Problems:

- Growing rural locality with surface waters nearby
- Growing rural locality without surface water sources
- Urban locality with increasing population or desire to serve expanding suburbs

Solutions:

- Add new intakes?
- Add new wells?
- Add intakes from a surface water in another locality?
- Increase surface water withdrawal from existing sources?
- Impoundment?



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Surface Water





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Riparian Doctrine

- Based on land ownership: Right to use water in natural rivers, lakes, streams belongs to owners of the banks of such water bodies
- Reasonable use: Equal right to make reasonable use for any purpose (as between competing riparian owners, some uses are favored)
- Property right: transferable



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Riparian Doctrine

- Limitations:
 - Right of use, not ownership
 - May not change quantity or quality
 - Use must be within the watershed - cannot remove from the riparian land
- But:
 - Can do anything until another riparian sues
 - Rights can be sold, rented, or lost by non-use
 - Rights can be taken by eminent domain

Enforcement of Riparian Rights

- Court action
- Reasonable use + damage
- Takings?



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Problems: Uncertainty

- Scarcity undermines the system: No problem when water supplies are plentiful
- Hard to plan: Quantity to which riparian owner is entitled is difficult to ascertain
- Does not protect earliest use against later uses (*i.e.*, first in time is not first in right)

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Problems: Municipal Needs

- **Not** addressed - no additional water rights for PWS
- But public water supply necessarily removes water from riparian land
- Is it a taking? Eminent Domain required?
- Prescription?
- Crown grants?



Problems: Interbasin Transfers

- Generally, may not divert beyond limits of riparian land **if** damages another riparian's use
- Theory: water used on riparian land will find its way back to the stream and be used by lower riparians
- But may be ok if prescriptive use



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Problems: Superior Rights of Some

- Hostile prescriptive rights
 - *e.g.*, Town of Gordonsville
- Crown grants
- Federal Navigational Servitude
 - Interstate commerce and rights of other states maintained



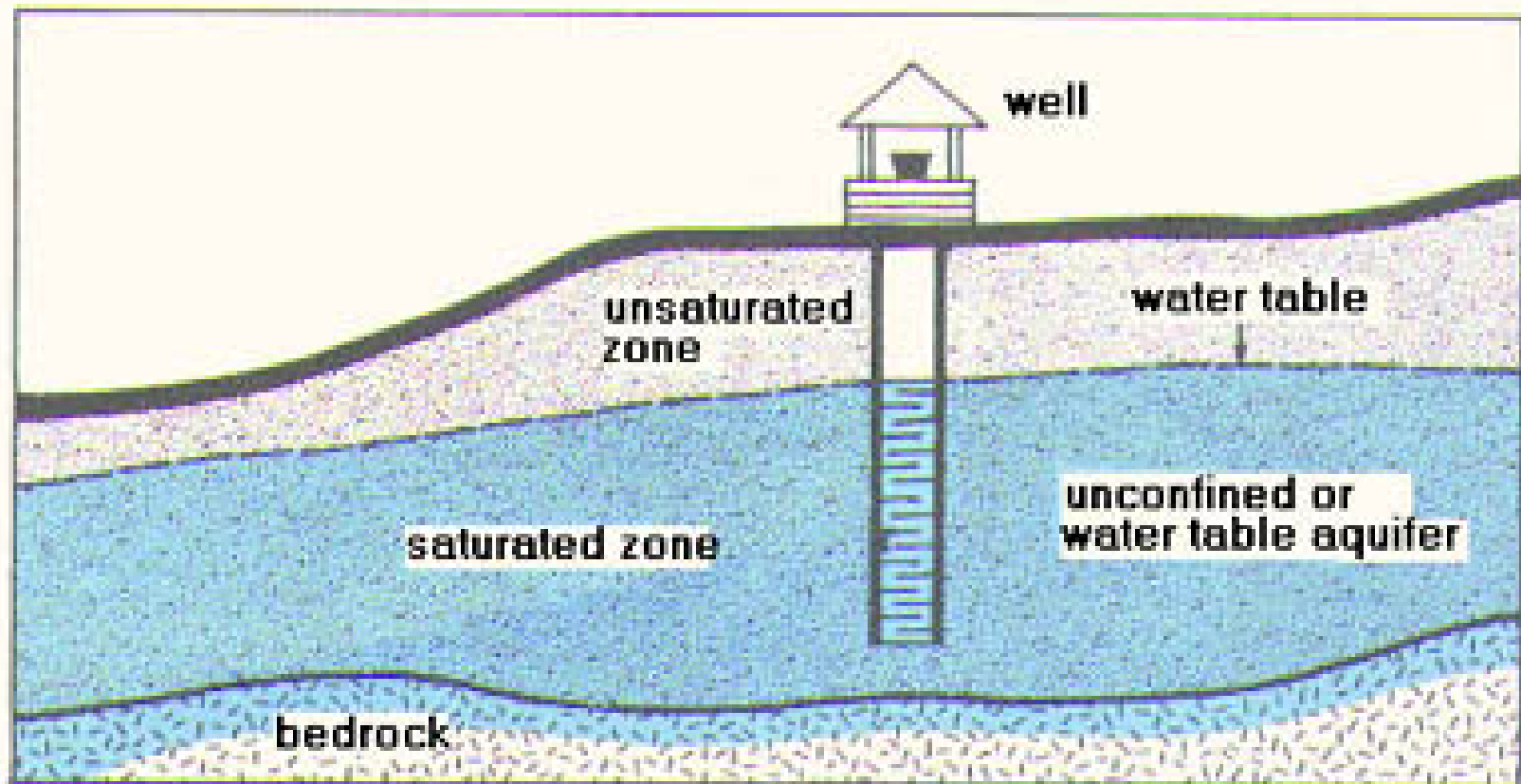
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Regulation by State

- State control is element of police power
- Code sec. 62.1-11(a): waters are a natural resource which should be regulated by the State
- But this does not apply to the determination of any right to use water as between riparians

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Groundwater





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Groundwater

- In Virginia:
 - Streams in known or well-defined channels; or
 - Percolating waters

A square image showing concentric ripples on a dark surface, likely water, with a dark blue gradient background.

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Underground Streams

- Where underground stream, riparian doctrine concept applies

Percolating Waters

- Percolating: waters which “ooze, seep, or filter through the soil beneath the surface, without a defined channel...”
- Also based on land ownership: Right to use goes to owners of surface of land
- Landowner may use on own property without limitation



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Problem: Exporting

- Unsettled doctrines:
 - English Rule – right is unlimited
 - American Rule – reasonable use theory; exporting water may be unreasonable if damage others



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State Regulation

- GWMA
 - 2 Ground Water Management Areas (Eastern Virginia and Eastern Shore)
 - Any person or entity wishing to withdraw 300,000 gallons per month or more in a declared management area must obtain a permit.



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“Solutions” Revisited:

- Add new surface water intake/increase withdrawals
=> what will lower riparian owners do? Do others have superior rights (prescription or Crown Grants)?
- Add new wells => what will adjacent well owners do?
- Add intakes in another locality? => is this an interbasin transfer and can it be challenged?
- New impoundments?

Bottom Line for Planning for Future

- Act => Don't react
- Examine risks to your existing water supply => location of sources and uses, availability, impacts on other users, new withdrawals
- Understand applicable legal regimes => what are your water rights; do you have prescriptive rights, Crown Grants?
- Consider options to reduce risk => determine reasonable uses, determine impact on others' water rights, acquire additional rights?

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